U.S. Department of Justice

Immigration and Naturalization Service

B7

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: Texas Service Center Date: DEC 12 2000

IN RE: Petitioner: [redacted]

Petition: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5), and § 610 of the Appropriations Act of 1993.

IN BEHALF OF PETITIONER:

[redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

[redacted]

DISCUSSION: The immigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. 1153(b)(5), and § 610 of the Appropriations Act of 1993. The director denied the petition finding that the petitioner failed to respond to a Notice of Intent to Deny within the allotted time. The director denied the petition on the grounds that the petitioner failed to establish a qualifying at-risk investment of the requisite amount of capital.

On appeal, counsel for the petitioner objected to the specifications in the Notice of Intent to Deny because those issues had not been raised by the center director in a prior request for additional evidence. Counsel then asserted that the petitioner did in fact timely respond to the Notice of Intent to Deny. Counsel submitted a copy of the original petition material, additional documentation, and stated that a written brief would be forthcoming on or before March 20, 1998. As of this date, no brief has been received by the Service.

§ 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

> (i) which the alien has established,
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> (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and
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> (iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The petitioner is a native and citizen of Taiwan. Documentation in the record indicates that the petitioner is currently residing in the United States, although no evidence of her immigration status was submitted. On July 17, 1997, the petitioner filed Form I-526, Immigrant Petition by Alien Entrepreneur, indicating that the petition was based on an investment in a new business in a targeted employment area eligible for downward adjustment of the minimum capital investment to $500,000 and indicating that the new business

[redacted]

is a "regional center" eligible for participation in the Immigrant Investor Pilot Program. The petitioner stated that she is one investor, in a pool of approximately 95 investors, in [redacted] or [redacted]. The general partner of AELP is [redacted] LLC ([redacted]") or [redacted] The petitioner stated that the General Partner is itself designated as a "regional center" that is eligible to satisfy the employment creation provision by demonstrating indirect employment creation through revenues generated from increased exports.

It is noted that the procedural objections to the Notice of Intent to Deny are without merit. Counsel did not support his objections to the issues raised in the Notice of Intent to Deny by any regulation or citation of case law. Nor is there any provision requiring the director to issue such a notice prior to his final decision. The record in this instance reflects that the director afforded counsel two formal opportunities to supplement the record of proceeding prior to the final decision. It must be concluded that the director acted wholly within his discretion.

PRECEDENT DECISIONS

During the pendency of this proceeding, the Service determined that certain provisions of the immigrant entrepreneur classification required clarification beyond the plain language of the regulations. The Associate Commissioner for Examinations ultimately published four precedent decisions addressing the classification; Matter of Soffici, I.D. 3359 (Assoc. Comm. Ex., June 30, 1998), Matter of Izumii, I.D. 3360 (Assoc. Comm., Ex., July 13, 1998), Matter of Hsiung, I.D. 3361 (Assoc. Comm. Ex., July 31, 1998), and Matter of Ho, I.D. 3362 (Assoc. Comm. Ex., July 31, 1998), as binding guidance in the adjudication of these petitions.

In Matter of Izumii, supra, the Associate Commissioner specifically addressed the facts of the AELP plan, as filed by a fellow limited partner of the instant petitioner, and found that the plan was not qualifying on a number of grounds. The Izumii decision, as are all published precedent decisions, is binding on all Service officers in the administration of the Act. 8 C.F.R. 103.3(c).

In Matter of Izumii, supra, it was held that in order for an investment to be qualifying it must be completed within the two-year period of conditional residence. The structure of the petitioner's investment agreement, consisting of a down payment with additional annual payments scheduled over a six-year period, therefore did not constitute a qualifying investment. The director also determined that the petitioner's investment did not constitute a qualifying investment for the purposes of this proceeding finding that the investment agreement's provisions for reserve funds,

escrow funds, and guaranteed returns prior to completion of the investment rendered those sums not acceptable as a part of the minimum capital investment; that the redemption agreements negated the at-risk element; and that the security interest of the promissory note was not perfected as required.

It was also held that the petitioner failed to demonstrate that AELP qualified for the reduced capital investment relief or the indirect employment creation relief. It was also held that the petitioner failed to demonstrate establishment of a new commercial enterprise where he or she had no hand in its creation. It was also held that the petitioner failed to adequately document the source of his funds and thereby failed to establish that the funds were obtained through lawful means.

The appeal from the denial of the instant petition will be reviewed under the guidance of these four precedents as applicable.

THE PETITIONER HAS NOT DEMONSTRATED THAT AELP IS ENGAGING IN APPROVED REGIONAL-CENTER ACTIVITIES IN TARGETED EMPLOYMENT AREAS

8 C.F.R. 204.6(e) states, in pertinent part, that:

> *Targeted employment area* means an area which, at the time of investment, is a rural area or an area which has experienced unemployment of at least 150 percent of the national average rate.

8 C.F.R. 204.6(j)(6) states that:

> If applicable, to show that the new commercial enterprise has created or will create employment in a targeted employment area, the petition must be accompanied by:
>
> (i) In the case of a rural area, evidence that the new commercial enterprise is principally doing business within a civil jurisdiction not located within any standard metropolitan statistical area as designated by the Office of Management and Budget, or within any city or town having a population of 20,000 or more as based on the most recent decennial census of the United States; or
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> (ii) In the case of a high unemployment area:
>
> (A) Evidence that the metropolitan statistical area, the specific county within a metropolitan statistical area, or the county in which a city or town with a population of 20,000 or more is located, in which the new commercial enterprise is principally doing business has experienced an average unemployment rate of 150 percent of the national average rate; or

[redacted]

(B) A letter from an authorized body of the government of the state in which the new commercial enterprise is located which certifies that the geographic or political subdivision of the metropolitan statistical area or of the city or town with a population of 20,000 or more in which the enterprise is principally doing business has been designated a high unemployment area. The letter must meet the requirements of 8 C.F.R. 204.6(i).

On October 19, 1995 [redacted] LLC filed its articles of organization with the State of South Carolina. On March 25, 1996, [redacted] Partnership filed its certificate of limited partnership with the State of South Carolina, and [redacted] was designated as [redacted] general partner. Both [redacted] and [redacted] are located in Charleston, South Carolina.

In a letter dated February 8, 1995, the Assistant Commissioner for Adjudications designated AEP a regional center and specified that individuals could file petitions with the Service "for new commercial enterprises located within the eight-county coastal areas, or Lowcountry, of South Carolina." On June 14, 1995, the Acting Assistant Commissioner for Adjudications expanded the geographical area covered by the AEP regional center to include 22 other counties in South Carolina.

The petitioner presented evidence that many, but not all, of the counties within this regional center were considered rural in 1995 and qualified at that time as targeted employment areas.[1]

According to the business plan submitted, AEP established a commercial credit corporation subsidiary, American Commercial and Export Credit Company, Inc. ("Commercial Credit"). The express purpose of Commercial Credit is to extend "asset-based loans"[2] to export companies that are located "throughout the Southeast." The

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[1] Of the 22 new counties added to the regional-center area, five; Aiken, Edgefield, Lexington, Richland, and Sumter counties, were not targeted employment areas in 1995 as they did not qualify as rural. Accordingly, the original 8 counties plus the added 17 counties results in a total of 25 counties within the regional center qualifying as targeted employment areas.

[2] In the business plan of AEP, an asset-based loan was distinguished from standard loans from institutional lenders. Asset-based loans are described as having minimum fees and interest rates and are secured by the accounts receivable of the borrower. The borrowers seeking asset-based loans are described as high-growth companies with $1 million to $10 million is sales that are unable to obtain traditional business loans from institutional lenders.

capital provided by the alien investors to [redacted] will be used to purchase stock in Commercial Credit, and Commercial Credit will use this money to secure loans from an institutional bank lender. Commercial Credit will then extend loans to or assume loans of export companies operating in the southeastern United States. It was stated that this institutional lender will increase the investment capital by a factor of three or four. In an explanatory memorandum accompanying the petition, counsel further explained that Commercial Credit will operate with its co-venturer, Resurgens Capital & Investment, Inc. ("Resurgens").

The business plan stated, "The first target area will be Colleton, Georgetown and Newberry counties in South Carolina, and the handful of companies located there which AEP considers good investment targets." The petitioner claimed in the memorandum accompanying the Form I-526 that her money will go to those areas.

In Matter of Izumii, supra, the Associate Commissioner determined that, regardless of its location, a new commercial enterprise that is engaged directly or indirectly in lending money to job-creating businesses may only lend money to businesses located within targeted employment areas in order for a petitioner to be eligible for the reduced minimum capital requirement. Furthermore, under the pilot program, if a new commercial enterprise is engaged directly or indirectly in lending money to job-creating businesses, such job-creating businesses must all be located within the geographic limits of the regional center. Id. The location of the new commercial enterprise is not controlling.

In the record of proceeding of the Izumii petition, the petitioner had submitted evidence of four loans made by Commercial Credit to date, all of which were outside of South Carolina. The director concluded that because the ultimate job-creating businesses were in neither targeted employment areas nor within the geographical limits of the designated regional center, the petitioner had not established eligibility for the reduced capital investment or the indirect employment option.

In this case, the petitioner submitted documentation of the same four loans addressed in the Izumii case. No documentation of any additional business activity of AELP was submitted. The petitioner's claim of eligibility for the reduced capital investment and the regional center relief rests solely on the assertion that her investment in AELP will result in business investments in the three or more of the qualifying counties in South Carolina comprising the regional center's geographical limits.

It cannot be concluded that the petitioner has established eligibility for the two forms of relief. First, the business plan of AEP and the actual business activity of Commercial Credit,

involving making loans to companies outside the geographic limits of the regional center, was reviewed and rejected in Izumii. That decision is binding.

Second, while the petitioner asserted that her investment capital would only be invested in the qualifying South Carolina counties, that claim is inconsistent with AEP's business plan.

Third, in the supporting memorandum counsel stated, "AEP is intending to complete business arrangements with companies located in the Colleton, Georgetown and Newberry areas. (See Exhibit 11A, Comprehensive Business Plan)." The petitioner's "comprehensive business plan" marked as Exhibit A is a four-page outline of AEP's business strategy. Section III of the plan refers to identifying a "handful of companies" as "good investment targets" in the three county area and estimates the creation of 2,500 jobs within three years.

The burden of proof in this proceeding is entirely on the petitioner. § 291 of the Act. In the memorandum, counsel made specific reference to completing in-progress business arrangements and supplemented that statement with a specific job creation projection. However, in neither document does the petitioner identify the export companies with which it is allegedly completing arrangements or identify the amount to be invested or explain how the job creation projection was derived. It must be concluded that simply making a series of unsubstantiated assertions, albeit cross-referenced assertions, is insufficient to meet the petitioner's burden of proof. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Fourth, the instant record does not establish that AELP has or could implement the practices set forth in the business plan only in the 25 qualifying counties of South Carolina. The petitioner has stated that the target clientele of AELP's financial services is a highly specialized market in a limited geographic region. That is, AELP's services are targeted only to (a) export companies, (b) in the 25 county region, (c) with a certain level of growth and earnings, (d) that are unable to obtain commercial loans from institutional lenders, and (e) that seek short term loans.

Where eligibility is claimed based on future business activity, rather than demonstrated activity, the Service must rely on the petitioner's business plan. In Matter of Ho, Int. Dec. 3362 (Assoc. Comm., Ex., July 31, 1998), the Associate Commissioner set forth basic requirements for a qualifying business plan that included a comprehensive market analysis. The petitioner did not submit a comprehensive market analysis or any other evidence demonstrating the number, if any, of companies fitting AELP's target customer profile that are in the 25 qualifying counties of South Carolina. Even if such export companies can be identified,

there is no evidence that they could or would avail themselves of AELP's services.[3]

It is noteworthy that the petition is based on the petitioner's stated intent to invest in AELP. Her capital would be made available to Commercial Credit. Commercial Credit would then obtain loans from institutional lenders increasing the capital by three to four fold. That capital would then be made available for lending to export companies in the specified geographical area. Based on this scenario, only one-third to one-fourth of any actual loan made to an export company would involve the capital raised by AELP. Only the capital advanced from AELP can be credited to the petitioner's claims of eligibility. The additional capital obtained from institutional lenders would not represent an investment by the petitioner creditable to the minimum requisite investment.

The same [redacted] investment plan was analyzed and rejected in Matter of Izumii. Nothing in the record of the instant petition establishes that the petitioner's investment plan can be distinguished from the plan in Izumii or has in any way overcome the director's objections.

The petitioner in this matter therefore must demonstrate both direct employment creation and the investment of at least $1,000,000.

QUALIFYING INVESTMENT OF CAPITAL

8 C.F.R. 204.6(e) states, in pertinent part, that

> *Capital* means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. All capital shall be valued at fair market value in United States dollars.

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[3] Based on the claim of 95 investors each investing $500,000, [redacted] would raise a capital base of $47.5 million. Based on the claim that the credit company's capital would be increased three to four fold by institutional lenders, the projected available capital would be between $142.5 million and $190 million. The petitioner submitted no evidence that a sustained market exists for this level of available capital in targeted employment areas within the designated regional center.

[redacted]

Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, or other entity which may be publicly or privately owned. This definition includes a commercial enterprise consisting of a holding company and its wholly-owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business. This definition shall not include a non-commercial activity such as owning and operating a personal residence.

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to

identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

Counsel stated that the petitioner has made an investment of $500,000 in the form of a $500,000 promissory note. This note provides for an initial deposit of $120,000 into a trust account, to be released to the partnership upon approval of the immigrant visa, five annual payments of $18,000, and a final balloon payment of $290,000.

As noted above, this same six-year plan was rejected in Izumii and the decision is binding. The petitioner must substantially complete payments on the promissory note prior to the expiration of the two-year conditional period of permanent residence in order for the promissory note to be considered a qualifying contribution of capital. See 8 C.F.R. 216.6(a)(4)(iii). In this case, the petitioner would have "invested" only $156,000 as of the expiration of the two-year conditional period and is not qualifying.

Initial Partnership expenses

According to section 2(A)(3) of the Investment Agreement and Power of Attorney executed by the petitioner, the petitioner agreed to instruct counsel, as trustee of her escrow account, "immediately to release US$30,000 as a refundable advance for initial expenses of the Partnership"; the remaining $90,000 would be released upon approval of the visa application. See also section 2 of the deposit agreement.

The payment of initial Partnership expenses and costs is not the type of profit-generating activity contemplated by the regulations; it does not evidence the placement of capital at risk for the purpose of generating a return on the capital placed at risk. See 8 C.F.R. 204.6(j)(2). As stated in Matter of Izumii, supra, if the new commercial enterprise is a holding company, the full requisite amount of capital must be made available to the business(es) most closely responsible for creating the employment on which the

petition is based. The $30,000 paid to [redacted] for Partnership expenses is not money available for loans to export companies and therefore cannot be counted toward the petitioner's required investment amount.

Annual payments

According to section 2.B of the investment agreement executed by the petitioner, the petitioner must make five annual cash payments of $18,000 each, totalling $90,000, commencing one year from the date she is admitted to the Partnership.

Section 3 of the investment agreement, however, states, "I shall receive a return on the cash I have contributed to the Partnership in the amount of 12% per annum, payable annually, commencing one year from the date I am admitted to the Partnership as a Limited Partner and ending five years thereafter."[4] The petitioner would also receive a share of any profits exceeding this 12-percent return. The partnership agreement explains that the percentage return is computed on the basis of the total cash contributed at the time the distribution is made. In other words, the petitioner would receive at least $93,600 in annual distributions during the five years.

It is noted that the petitioner's obligation to make her annual payments is conditioned upon the Partnership making its guaranteed annual distributions to her. Section 2.C of the investment agreement states:

> In the event of the bankruptcy, the insolvency, or the failure of the partnership to pay the annual return on capital, to pay the sell option price, or to pay any judgment, the Partnership shall be deemed to be in breach of its obligations to the Limited Partners under the American Export Limited Partnership Agreement, and I, as a Limited Partner, shall have no further obligations to the Partnership, and furthermore, I shall not be obligated to make any further cash payments under the Limited Partnership Agreement, this Investment Agreement or the Promissory Note.

As stated in Matter of Izumii, supra, an alien may not receive guaranteed payments from a new commercial enterprise while he or she owes money to the new commercial enterprise. As the Partnership receives no infusion of new funds from the petitioner, the schedule of annual payments intended to represent $90,000 does not constitute a qualifying contribution of capital.

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[4]The partnership agreement, however, provides that this return is **10** percent per year, payable for **four** years.

[redacted]

Redemption agreement

Section 4 of the investment agreement provides, "after the sixth anniversary of my admission to the Partnership, I, as a limited partner, may exercise a sell option under which I have the **right to require** the Partnership to purchase from me my limited partnership interest," (emphasis added).[5] The sell-option price is equal to the petitioner's total contributed capital, less the first six payments, plus a pro rata share of profits. In other words, the sell-option price is $290,000 plus profits. At the same time, the Partnership may exercise a buy option for the same price.[6]

Section 4 of the investment agreement specifies that the sell-option price is "payable as soon as the sell option is exercised." Section 8.05.C of the partnership agreement, however, states that the price is payable 180 days after the exercise of the sell option. By signing the investment agreement, the petitioner agreed pursuant to section 9 that she would be bound by the provisions of the partnership agreement; it is not clear which agreement is controlling, as they are inconsistent with one another.

The agreements do not specify whether the petitioner is obligated actually to make the last payment of $290,000 if she exercises her sell option; both her responsibility to pay and her right to sell ripen at the same time. Section 8.05.C of the partnership agreement provides that once the Partnership pays the sell-option price, "all amounts owed under such Selling Limited Partner's Investor Note shall be deemed satisfied by the Partnership..." Similarly, under section 8.06.C, after the Partnership pays the buy-option price, "all amounts due and owing under the Investor Note shall be discharged by the Partnership..." It is not known what amount would still be owed if the petitioner is obligated to pay the $290,000 prior to the exercise of the buy or sell option. If the petitioner can avoid making this last payment by exercising her sell option, this amount of $290,000 cannot be considered to have been placed at risk.

Even if the petitioner is obligated to make this balloon payment prior to exercising her sell option, the $290,000 still cannot be said to be at risk because it is guaranteed to be returned, regardless of the success or failure of the business. If the investment agreement executed by the petitioner is controlling, then the moment she made this last payment, the petitioner could exercise her sell option, and the money would be immediately

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[5]It is noted that the partnership agreement instead states that the sell option is exercisable after five years.

[6]Section 8.06 of the partnership agreement states that this "buy option" is exercisable after **three** years.

returned; the amount of $290,000 would never be at risk. If the partnership agreement is controlling, then the petitioner's agreement to make this payment of $290,000 is, in essence, a debt arrangement in which she provides funds in exchange for an unconditional, contractual promise that it will be repaid later at a fixed maturity date (six months later).[7] Such an arrangement is specifically prohibited by the regulations. See 8 C.F.R. 204.6(e).

As stated in Matter of Izumii, supra, an alien cannot enter into a partnership knowing that she already has a willing buyer in a certain number of years, nor can she be assured that she will receive a certain price. Otherwise, the arrangement is nothing more than a loan, albeit an unsecured one. Therefore, prior to completing all of her cash payments under a promissory note, an alien investor may not enter into any agreement granting her the right to sell her interest back to the partnership. The petitioner here has already entered into such an agreement. The $290,000 is, at best, a debt arrangement and cannot be considered to be an at-risk investment of capital.

Cash reserves

The definitions section and section 4.04 of the partnership agreement state that the general partner may deposit portions of the limited partners' capital contributions, designated as "reserve funds," in escrow or sub-escrow accounts. According to section 4.04.A(i) of the agreement, the banks holding these accounts shall invest the funds "in securities or other financial instruments and obligations in amounts sufficient to satisfy the requirements of **Section 8.05**," (emphasis in original). Section 4.04.B adds that the general partner "shall deposit with the Banks from the Initial Cash Payments sufficient Reserve Funds to satisfy the Partnership obligations under **Section 8.05** and to defray such costs and expenses of the Partnership as determined by the General Partner," (emphasis in original). Section 8.05 of the partnership agreement is entitled "Limited Partner Sell Option" and sets forth the timing and price of the sell option. As mentioned earlier, under the investment agreement, this petitioner would be entitled to a sell-option price of $290,000.

Section 4.03.B explains that after all the requirements of section 4.04.B are satisfied, any funds remaining from the initial cash payments and all subsequent capital contributions may be used to meet the obligations of the Partnership, as determined by the general partner in its sole discretion, with any excess to be used in the business of the Partnership.

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[7]The risk that the petitioner might not receive payment if the Partnership fails is no different from the risk any business creditor incurs.

In other words, pursuant to the above sections of the partnership agreement, the general partner would be obligated to deposit sufficient portions of the initial $120,000 and/or the remaining $380,000 into the reserve funds such that the deposits and their earnings (from securities or other financial instruments) would enable the Partnership to fulfill its own obligations to buy back Partnership interests. The creation and maintenance of these reserve funds take priority over any other use of the capital contributions. Under these terms, any leftover money would be used for other Partnership obligations, and whatever was left thereafter would then finally be used for business activities.

These reserve funds are, by agreement, not available for purposes of job creation.[8] As stated in Matter of Izumii, supra, reserve funds that are not made available for purposes of job creation cannot be considered capital placed at risk for the purpose of generating a return on the capital being placed at risk.

Fair market value of promissory note

The petitioner claims that her promissory note is evidence that she has committed $500,000 to AELP. Promissory notes may qualify as capital themselves or as evidence that a petitioner is "in the process" of investing other capital, such as cash.

For a promissory note to constitute capital, it must be secured by assets belonging to the petitioner. 8 C.F.R. 204.6(e) (definition of "capital"). In addition, the assets must be specifically identified as securing the note, the security interests must be perfected to the extent provided for by the jurisdiction in which the assets are located, and the assets must be fully amenable to seizure by a U.S. note holder. Matter of Hsiung, Int. Dec. 3361 (Assoc. Comm., Ex., July 31, 1998).

The director found that there was no evidence that any of the petitioner's assets are formally attached as security for the promissory note. Counsel argued on appeal that the security interest of the promissory note was secured according to Service policy at the time the petition was filed and that there was no requirement that the security interest actually be perfected.

Again, the finding in Matter of Hsiung, supra, is binding. Counsel argued against the director's application of the precedent to the instant petition, but did not submit additional evidence on appeal

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[8]Even if, after six years, the petitioner elected to remain in the Partnership instead of exercising her redemption option, the reserve provisions would still preclude the capital from being placed at risk during the two-year conditional period, as required by the regulations.

to demonstrate that the security interest has been perfected as required by the regulations and the precedent. Nor did he offer an explanation for the failure to correct this deficiency on appeal.

The promissory note does not meet the definition of "capital." Even if it did, the regulations at 8 C.F.R. 204.6(e) further provide that all capital must be valued at fair market value in U.S. dollars. When determining the fair market value of a promissory note being used as capital, factors such as the fair market value of the assets securing the note, the extent to which the assets are amenable to seizure, and the present value of the note should be considered. Matter of Hsiung, supra. The record contains no documentation addressing these additional factors. In addition, the petitioner has submitted no evidence as to the present value of the promissory note. The petitioner has failed to establish that the promissory note has any fair market value at all, let alone $380,000 or $500,000.

Under certain circumstances, a promissory note that does not itself constitute capital could instead constitute evidence that the petitioner is "in the process of investing" other capital, such as cash. Whether a petitioner uses a promissory note as capital or as evidence of a commitment to invest cash, he or she must show that the assets are placed at risk. In establishing that a sufficient amount of her assets are at risk, a petitioner must demonstrate, among other things, that the assets securing the note are hers, that the security interests are perfected, that the assets are amenable to seizure, and that the assets have an adequate fair market value. Matter of Hsiung, supra. The petitioner here fails on all counts.

Petition Form

It is noteworthy that on Part 4 of the I-526 petition form, the petitioner stated that the new commercial enterprise had total assets of $163,000 and a net worth of $9,734. While the petitioner did not submit any financial statements of AELP, these figures appear to be inconsistent with the claim that up to 95 investors have invested $500,000 each into AELP. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

> (3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained

through lawful means, the petition must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

Regarding the initial deposit of $120,000, the petitioner submitted a letter dated June 25, 1997, from Wells Fargo Bank, Los Angeles, California, addressed to the petitioner stating that "your funds" have been received and deposited into the "custody account" of counsel's law firm. The letter does not identify the source of the funds or the account from which they were transferred. Therefore, it cannot be concluded that the alleged initial deposit of $120,000 represents an investment of funds belonging to the petitioner and that they are funds obtained by lawful means.

In the memorandum accompanying the petition, the petitioner claimed that her investment funds will come from the income and assets of her in-laws and her spouse. It was stated that the petitioner's in-laws were "prominent landowners" in Taiwan and that her husband is President of TGI Water, Inc., a distributer of water purification systems, in Houston, Texas.

In this case, the petitioner failed to submit the evidence specified in the pertinent regulation, that is, business records and tax records. Nor was evidence submitted of any personal funds transferred to AELP. It is noteworthy that while the petitioner submitted documentation such as copies of bank account balance statements, she did not state her or her husband's salary or their average annual income. Clearly, merely declaring that one's family members have been successful or prominent in business matters is

not sufficient to satisfy the petitioner's burden of proof under the standard set forth in the regulations and in Matter of Treasure Craft of California, supra. In the absence of the documentation required by 8 C.F.R. 204.6(j)(3), it cannot be concluded that the petitioner has satisfied this requirement.

Furthermore, in the case of a new commercial enterprise involving multiple investors, it is incumbent on each petitioner to identify the source of all investment capital and demonstrate that it has been obtained by lawful means.

8 C.F.R. 204.6(g)(1) states, in pertinent part:

> The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur even though there are several owners of the enterprise, including persons who are not seeking classification under section 203(b)(5) of the Act and non-natural persons...**provided that the source(s) of all capital invested is identified and all invested capital has been derived by lawful means.** (Emphasis added.)

Based on the petitioner's assertions, AELP has approximately 95 investors. The petitioner bears the burden to identify the source of investment capital from all of these investors and to establish that they were derived by lawful means. The petitioner has not furnished evidence addressing this requirement with the petition. There is no evidence identifying the source of the investment capital of the other alien investors or of the General Partner. The petitioner therefore failed to meet the requirements of 8 C.F.R. 204.6(g)(1) and the petition may not be approved on this basis as well.

THE PETITIONER HAS NOT ESTABLISHED A NEW COMMERCIAL ENTERPRISE

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of:

> (1) The creation of an original business;
>
> (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
>
> (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-

[redacted]

> expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 C.F.R. 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 C.F.R. 204.6(j)(4)(ii).

According to the plain language of § 203(b)(5)(A)(i) of the Act, a petitioner must show that she is seeking to enter the U.S. for the purpose of engaging in a new commercial enterprise that **she** has established. The new commercial enterprise at issue here is AELP. AELP was established on March 25, 1996. The petitioner did not execute the "investment agreement" and "secured promissory note" until sometime later, although the copies of both documents submitted into evidence are undated.

Moreover, according to the Investment Agreement the petitioner's admission to the partnership is conditioned, in part, on approval of her petition and on her admission as a permanent resident. As the petition has not been approved and the alien has not been admitted as a lawful permanent resident, the alien is not yet a limited partner of AELP. A petitioner cannot be said to have established a business where there is no actual ownership interest in that business. Therefore, it cannot be concluded that the petitioner established a new commercial enterprise within the meaning of the Act.

Additionally, 8 C.F.R. 204.6(e) defines a qualifying commercial enterprise, in part, as a holding company and its wholly owned subsidiaries. In this case, both AEP and AELP essentially function as holding companies. Commercial Credit is the entity that would actually extend loans to export companies. However, Commercial Credit is not a wholly owned subsidiary. While counsel did not submit the incorporation documents of Commercial Credit or the records of its stock distribution, it was stated that is partly owned by Resurgens. As Commercial Credit is not a qualifying commercial enterprise, the petitioner fails to satisfy the establishment requirement on this basis as well.

THE PLAN DOES NOT MEET THE EMPLOYMENT-CREATION REQUIREMENT

8 C.F.R. 204.6(j)(4)(i) states:

> To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

[redacted]

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. 204.6(g) deals with multiple investors and states, in pertinent part:

(1) The establishment of a new commercial enterprise may be used as the basis of a petition for classification as an alien entrepreneur by more than one investor, provided each petitioning investor has invested or is actively in the process of investing the required amount for the area in which the new commercial enterprise is principally doing business, and provided each individual investment results in the creation of at least ten full-time employees.

(2) The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

As stated earlier, the subsidiary credit corporation here has not extended loans in the past to export-related businesses located within the geographical limitation of the regional center. No reason exists to believe that this petitioner's money will be lent to businesses within the geographical area. Therefore, she must establish direct employment creation. The petitioner has failed to either assert or show that AELP has hired or will hire a sufficient number of employees to allocate 10 full-time positions to her and to each of the limited partners. Therefore, the petitioner has not established that her investment would result in the creation of at least ten new permanent jobs.

[redacted]

CONCLUSION

In conclusion, the petitioner is ineligible for classification as an alien entrepreneur because she has failed to meet the capital investment minimum of $1,000,000, has failed to demonstrate that she has established a new commercial enterprise, has failed to show that she has made a qualifying at-risk investment in a new commercial enterprise, has failed to establish the source of her investment capital and show that it was obtained through lawful means, and has failed to demonstrate that the investment will result in the requisite employment creation. For these reasons, the petitioner has failed to establish eligibility for immigrant investor classification of § 203(b)(5) of the Act.

The burden of proof in these proceedings rests solely with the petitioner. § 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.